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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

H4

Date: AUG 2 1 2012 Office: SAN JOSE, CA FILE: [redacted]

IN RE: Applicant: [redacted]

APPLICATION: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under section 212(a)(9)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A)(iii)

ON BEHALF OF APPLICANT:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew,
Chief, Administrative Appeals Office

DISCUSSION: The Field Office Director, San Jose, California, denied the Application for Permission to Reapply for Admission into the United States after Deportation or Removal (Form I-212). A subsequent appeal was denied by the Administrative Appeals Office (AAO), and the application is now before the AAO on motion. The motion will be granted and the previous decision of the AAO will be affirmed.

The record reflects that the applicant is a native and citizen of Mexico who was removed from the United States on or about September 26, 1999. The applicant last entered the United States as a P-1 nonimmigrant on September 28, 2001, and applied for adjustment of status based on an approved Form I-130 petition on his behalf. The applicant is inadmissible pursuant to section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii). He seeks permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(iii), in order to reside in the United States with his U.S. citizen wife.

The field office director determined the applicant was inadmissible pursuant to section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure admission into the United States by willful misrepresentation, and denied the Form I-212 as a matter of discretion because his Form I-601 had been denied. *See Field Office Director's Decision.* June 27, 2009. The applicant appealed the denial of his Form I-212, which was dismissed by the Chief, AAO, because the applicant had not established that he had an approved Form I-601 waiver for his inadmissibility under section 212(a)(6)(C) of the Act. *AAO decision*, January 17, 2012.

The applicant then filed a Form I-290B, listing his Form I-212, Form I-601, and Form I-485 as the applications subject to his motion to reopen and reconsider. However, the AAO notes that the applicant's Form I-601 was denied on June 27, 2009, and was not appealed. The AAO does not have jurisdiction over a Form I-485, Application to Adjust Status to Lawful Permanent Resident, and did not issue the last decision on the applicant's Form I-485 filing. As such, the AAO will only accept the applicant's motions to the extent that they address the Form I-212 decision issued by the AAO on January 17, 2012.

The record contains, but is not limited to, a brief from counsel for the applicant; documentation filed in relation to the applicant's prior removal and subsequent re-entry into the United States; evidence related to establishing extreme hardship in an I-601 waiver proceeding; and documentation related to the applicant's criminal record. The entire record was reviewed and all relevant evidence considered in rendering this decision.

Section 212(a)(9) of the Act states in pertinent part:

> (A) Certain aliens previously removed.-
>
> > (i) Arriving aliens.- Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon the alien's arrival in the United

States and who again seeks admission within five years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) Other aliens.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 or any other provision of law, or

(II) departed the United States while an order of removal was outstanding, and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) Exception.- Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign contiguous territory, the Secretary has consented to the alien's reapplying for admission.

The record reflects that on September 26, 1999, the applicant attempted to enter the United States using a Mexican passport with his photograph substituted for that of the true owner. He was detained and expeditiously removed. The applicant re-entered the United States on or about September 28, 2001, as a P-1 nonimmigrant and has resided in the United States since that time. The applicant is, therefore, inadmissible pursuant to section 212(a)(9)(A)(ii) of the Act and requires permission to reapply for admission into the United States under section 212(a)(9)(A)(iii) of the Act.

On motion, counsel asserts that the 9th circuit's holdings in *Perez Gonzalez v. Ashcroft*, 379 F.3d 783 (9th Cir.) and *Duran Gonzalez v. DHS*, 508 F.3d 1227 (9th Cir. 2007) are still relevant to this case and the holding of *Duran Gonzalez* should not be applied to this case retroactively. As noted by the Chief, AAO, the holdings in these cases dealt with inadmissibility under section 212(a)(9)(C) of the Act, not section 212(a)(6)(C) as in this case. The applicant is required to file an I-601 in order to waive his inadmissibility under section 212(a)(6)(C) of the Act. Without a waiver application, the applicant would remain inadmissible regardless of whether his Form I-212 was granted. Counsel has not cited any legal authority requiring United States Citizenship and Immigration Services (USCIS) to adjudicate an application that would serve no purpose. Counsel refers to a third, uncited case, and asserts that a private advocacy organization has filed an amicus curae brief in the matter, indicating that the holdings relate because the applicant is applying for relief under section 245(i) of

the Act. Amicus curae briefs do not constitute legal authority. Nor has the applicant submitted copies of the briefs. In addition, the discussion of relief under section 245(i) in those cases only relates to the extent that 212(a)(9)(C) of the Act requires them to reside outside the United States for a period of 10 years before they can seek permission to reapply for permission. Here, the applicant is not required to reside outside the United States for a period of ten years pursuant to section 212(a)(9)(C) of the Act. The applicant is, however, required to obtain waivers of inadmissibility pursuant to a Form I-601 and a Form I-212 in order to establish eligibility for admission to the United States and adjustment of status. As such, the AAO finds no basis for counsel's assertions that these cases apply to the instant case.

Counsel asserts that the applicant has contested his inadmissibility under section 212(a)(6)(C) of the Act, that USCIS should rely on a discussion in the Acting Field Officer's decision granting a motion to reopen on August 30, 2008, to approve the applicant's Form I-601 seeking relief based on extreme hardship to his spouse, and that the applicant is not inadmissible pursuant to section 212(a)(2)(A) of the Act because his conviction for Domestic Assault Inflicting Corporal Injury to a Spouse falls under the petty offense exception under section 212(a)(2)(A)(ii)(II).

In its previous decision the AAO noted that the applicant may be inadmissible pursuant to section 212(a)(2)(A) of the Act for having been convicted of a Crime Involving Moral Turpitude, but did not reach a conclusion on the matter because the record lacked evidence regarding the conviction to settle the issue. The record now contains documentation regarding the applicant's criminal charges. While an examination of the applicant's inadmissibility under section 212(a)(2)(A) is more appropriate in adjudicating a Form I-601, section 212(h) waiver, in this case the AAO notes that counsel is incorrect in asserting the applicant's charge and subsequent conviction meet the petty offense exception because the state law in question clearly states that the maximum sentence was four years. Further, counsel's assertions do not establish that Willful Infliction of Corporal Injury is not a violent or dangerous crime. As previously stated by the AAO, the applicant is likely inadmissible under section 212(a)(2)(A)(i) of the Act and his violent offense likely subjects him to the higher hardship standard found in the regulation at 8 C.F.R. § 212.7(d). However, the AAO need not settle these questions in the context of the present Form I-212 application.

In *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973), the Regional Commissioner listed the following factors to be considered in the adjudication of a Form I-212 Application for Permission to Reapply After Deportation:

> The basis for deportation; recency of deportation; length of residence in the United States; applicant's moral character; his respect for law and order; evidence of reformation and rehabilitation; family responsibilities; any inadmissibility under other sections of law; hardship involved to himself and others; and the need for his services in the United States.

The applicant is inadmissible under section 212(a)(6)(C)(i) of the Act.[1] He requires a waiver of inadmissibility under section 212(i) of the Act in order to establish eligibility for admission to the United States. In the instant case, the applicant has not obtained an approval of Form I-601, Application for Waiver of Grounds of Inadmissibility. The applicant's Form I-601 was not approved and the applicant did not file an appeal of that denial. A such, he remains inadmissible to the United States pursuant to section 212(a)(6)(C)(i) of the Act, regardless of whether this petition for permission to reapply for admission is granted. As such, no purpose would be served in reaching the merits of the applicant's Form I-212 application.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is upon the applicant to establish he is eligible for the benefit sought. After a careful review of the record, it is concluded that the applicant has failed to that a favorable exercise of the Secretary's discretion is warranted. Accordingly, the motion will be granted and the previous decision of the AAO will be affirmed.

ORDER: The motion is granted and the previous decision of the AAO is affirmed.

[1] As discussed above, the applicant may also be inadmissible under section 212(a)(2)(A) due to his conviction for Willful Infliction of Corporal Injury to his spouse and subject to the higher standard of hardship under 8 C.F.R. § 212.7(d) due to the violent nature of his offense.